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Pope Benedict XVI's Legal Thought

A DIALOGUE ON
THE FOUNDATION OF LAW

Edited by
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13 ACTING CONTRARY TO REASON IS CONTRARY TO GOD'S NATURE

Andrés Ollero

For a professor such as myself, it is a true gift to read and listen to Pope Benedict XVI who, after being intellectually formed as an educator, thought it logical to go on being one, and never stopped adding to his long list of academic works. It is also reassuring for a lay person that he spent years orienting his thought toward academics of widely diverse beliefs and mentalities, and not to a specialized audience that was already convinced a priori. And for a person who has served as an elected representative during the last two decades, gratitude is owed to Benedict for the careful attention he paid to the issues of law and politics that are crucial to democratic life. Therefore, I was honored to receive this invitation to comment on some of his speeches, as I have done elsewhere on other occasions, and it was only logical for me to accept.¹ This time I will focus on his speech at the historic University of Regensburg, which – for reasons which today seem purely anecdotal – has been a constant source of controversy. In order to do so, it is important for me to acknowledge the significant intellectual debt that I owe to Benedict XVI, even at the risk of seeming vain in my use of self-citations.

What struck me most in all of these speeches was the fact that Benedict was constantly concerned with the dialogue between “faith and reason,” which he addressed at Regensburg in such a risky way. The Pope Emeritus strove to discredit two points of view. First, the

¹ “Hacer entrar en razón al Estado de Derecho. Benedicto XVI aborda los fundamentos del Estado,” in *Acta Philosophica* (Pontificia Università della Santa Croce) 2012 (21-II), 386–390, which discusses: Pope Benedict XVI, Visit to the Bundestag, Reichstag Building, Berlin, September 22, 2011.

view that places God beyond any possible logic, and ends up justifying the use of violence in the name of certain sacrosanct rights to truth: "To convince a reasonable soul, one does not need a strong arm."² Second, the view that, consciously or unconsciously, fails to free itself from the "modern self-limitation of reason" that prevents one from finding rational responses to important "specifically human" questions.

Figurative speech aside, it would be unfair to attribute the barely rational premises of the first view to Muslim culture alone. While it is certainly true that theirs is an "absolutely transcendent" God whose "will is not bound up with any of our categories, even that of rationality," I fear that this fideistic approach is widespread even in culturally Christian circles, which are as in need of a new evangelization as are nonbelievers.

In my opinion, the medieval voluntarism of William of Okham³ or Duns Scotus is not a thing of the past, but continues to present us even today with an arbitrary God, who is "not even bound to truth and goodness." How many Christians believe that we should not kill another human being because God wills it, and how many because this kind of behavior expresses an inhuman irrationality? Is the natural law true because God wills it to be, or does God teach that we should follow it because it is true? And do we say that marriage is indissoluble because God wills it, or are there reasons – reasons not derived from some supernatural knowledge – which explain why indissolubility is an essential characteristic of this natural institution? It is a shame that the natural law has become a doctrine for Catholics, but it is even more serious that they are unable to justify it without fideistic references to a supernatural foundation, perhaps believing that by eliminating reason the glory of God is increased.

² This and the following quotations are from Benedict XVI, Meeting with the representatives of science, Aula Magna of the University of Regensburg, Regensburg, September 12, 2006.

³ This would fit smoothly with Ibn Hazm's assertion that God "is not bound even by his own word, and that nothing would oblige him to reveal the truth to us. Were it God's will, we would even have to practise idolatry" (id.).

THE SECULARISM OF BENEDICT XVI

I am happy to note that Benedict takes an intellectual approach as he points to a God who delights in interacting with human beings and reasoning with them: "the truly divine God is the God who has revealed himself as logos and, as logos, has acted and continues to act lovingly on our behalf." Repeatedly faced with the experience of a God who loves us, a natural enough response is to love him back. If – in order to be more human – we must imitate him, we must begin by insisting that we ourselves act with rationality. Indeed, as one can infer from the dialogue presented in the speech at Regensburg, "[n]ot to act reasonably . . . is contrary to the nature of God."⁴

It is important to clarify what is meant here by "rational." If some Christians subscribe to a form of fideism similar to that of many Muslims, then it is not unlike the moral issues to which positivism refers. We live in a civilization that ends up subscribing by default to scientific positivism, with its dogmatic idea of reason, science, and experimental methodology; the absence of reflection and weak effort to reason have allowed legal positivism to flourish where rationality has never been cultivated. We pass our days discussing the rule of law, but in the end we must always acknowledge that the law is a tool of the state. Our legal order is presumably founded on respect for certain fundamental rights, but we rarely acknowledge the existence of an objective ethical foundation that is purely assumed.

Perhaps the most obvious proof of the fact that, tied as we are to this rigid, pseudoscientific concept of rationality, "we are faced with a reduction" that carries negative practical consequences. Fundamental needs – respected in many premodern cultures – such as the respect for human life, are met with serious resistance in the context of the very young and very old; provided that no racial or gender connotations are involved.

This *unconscious positivism*, no stranger to Catholic circles, illustrates a curious connection between law and morality. The tendency

⁴ Benedict was forced to clarify that "It was purely for the sake of this statement that I quoted the dialogue between Manuel and his Persian interlocutor" after an explosion of controversy.

to misunderstand law as a helpful reinforcement for particularly important moral demands does not, in my view, generate favorable consequences. Much more sensible is the understanding of law as a *minimum ethical standard*, to which must be added a character of indispensability in order to make truly human coexistence possible.

Certainly the *minimum* character puts it at risk for being transposed to highly moral demands. Pope Benedict XVI himself had to face this problem in a speech that focused on marriage, but which can ostensibly be applied to the tragedies brought about by the occurrences of pedophilia that rocked the Church in several different countries. Despite being minimal, its *necessary* character means that it does not make sense to propose the minimal demands of charity which, rather than respecting it, contend to be its alternative.⁵

Moral demands lead a Christian to strive for behaviors that transcend any logic: to love one's enemies and turn the other cheek (thus the danger of considering them to be exaggerations relegated to experts). Natural law, on the contrary, does not claim to go beyond the elucidation of certain ethical standards that prevent our societal life from falling below minimally acceptable levels. It is not that we reject the love of neighbor; but we begin with a basis of respect and equal treatment.

LAW AND MORALITY

In large part, the Ten Commandments, despite being minimal, are more juridical than moral. The commandment *do not kill* is more convincing if, rather than considering it a moral requirement – one that is so important as to deserve back-up from the law – it is

⁵ “Justice, which the Church pursues through the contentious-administrative process, can be considered as a beginning, a minimal requirement and at the same time an expectation of charity, at once indispensable and yet insufficient, if it is compared with the charity on which the Church lives. Nevertheless the pilgrim People of God on earth will be unable to realize its identity as a community of love unless it takes into consideration the demands of justice.” Pope Benedict XVI, Address to members of the Supreme Tribunal of the Apostolic Signatura, February 4, 2011.

recognized as a legal requirement without which human coexistence would fall below minimally acceptable levels. Precisely because of its minimal, indispensable nature it generates a moral obligation, inverting the usual order.⁶

The well-intended subordination of law to morality can paradoxically undermine the strength of its demands, in a cultural context in which – as Benedict points out – “the subjective ‘conscience’ becomes the sole arbiter of what is ethical. In this way, though, ethics and religion lose their power to create a community and become a completely personal matter.”⁷ Abandoning the objectivity of the *logos*, because of a tendency toward pious sentimentality, leads to a wrong understanding of the expression *act according to conscience* as an invitation to a well-intended arbitrariness. The result is rejection of the need for a well-established foundation of ethical criteria, based on the careful interpretation of objective norms.

The difficulty of admitting that law – in the sense of the indispensable minimums described earlier – has priority over the minimal demands of morality is tied to the *unconscious positivism* referred to earlier, which overlooks the natural law. If law refers to what is imposed by those in power, then clearly it makes little sense to suggest that moral obligations derive therefrom; even the most inflexible positivists acknowledge this.⁸ If, on the contrary, law is considered an ensemble of ethical demands derived from the nature of humanity itself (as it must be, since we consider certain human rights to be capable of affecting the laws in force), it comes as little surprise that they generate a moral obligation to obey. Ultimately, the moral virtue of justice is in giving each his just due; this implies an a priori awareness of what is or is not legally due.

⁶ I gave a more detailed account of this idea in *Derecho y moral. Una relación desnaturalizada*, *Fundación Coloquio Jurídico Europeo*, Madrid, 2012, 11–51, 117–131, 133–162 and 265–311.

⁷ This and the following citations are once again from Benedict XVI, Meeting with the representatives of science, Regensburg.

⁸ Norberto Bobbio, for example, writes it off as an expression of ideological positivism. Cfr. N. Bobbio, *Giusnaturalismo e positivismo giuridico*, Laterza, Roma-Bari 2011, 92–94.

Unconscious positivism, which results from a dearth of reflection and reasoning, leads to a misunderstanding of conscientious objection, as though a conflict existed between legal demands and moral convictions. This understanding leaves it defenseless because it makes little sense to suggest that adherence to legal norms comes second to each person's moral code, let alone that we all have a right to such a code. If the objection appears in international declarations of rights and in democratic constitutions, it is because it is understood as a legal discrepancy between two concepts of justice. It follows that, in a liberal system, a place must be carved out for the legal demands of the minority such that they are not crushed by those of the majority, to the extent that the exception is compatible with social stability. At play here are two different concepts of law, not the juxtaposition of law and morality.

Few worldviews illustrate the consequences of a restrictive approach to rationality better than legal positivism, intentional or not. Therefore, it is appropriate to propose not a rejection of positive science, but an invitation to "broaden . . . our concept of reason and its application," without implying any intention to "retrenchment" or "negative criticism." Unsurprisingly, this is one of the points of complete agreement between then-Cardinal Ratzinger and his compatriot Jürgen Habermas⁹ in one of the most important cultural debates of the turn of the century.¹⁰ What they propose is "courage to engage the whole breadth of reason, and not the denial of its grandeur." The two thinkers concur in suggesting a resetting of modern reason, without calling into question its positive contributions. This has to do with facing "a critique of modern reason from within [which] has nothing to do with putting the clock back to the time before the Enlightenment and rejecting the insights of the modern age." For Benedict XVI, *Aufklärung* (enlightenment) began on Mount Sinai. We find ourselves before a "process which started

⁹ I explored this debate in "La crítica de la razón tecnológica. Benedicto XVI y Habermas, un paralelismo sostenido," *Anales de la Real Academia de Ciencias Morales y Políticas* 2010 (LXII-87), 435–451.

¹⁰ J. Habermas and J. Ratzinger, *The Dialectics of Secularization: On Reason and Religion*, San Francisco: Ignatius Press, 2006.

at the burning bush," then before the possibility of a "new understanding of God" which is "accompanied by a kind of enlightenment." "A profound encounter of faith and reason is taking place here, an encounter between genuine enlightenment and religion," that makes it possible to say: "Not to act 'with logos' is contrary to God's nature."

BIBLICAL MESSAGE AND GREEK THOUGHT

In response to a frivolously liberal belief that the rejection of the past is enough to bring about positive consequences, and that the natural law should be consigned to some obscure altar, Benedict XVI suggests that "[t]he encounter between the Biblical message and Greek thought did not happen by chance," but that "[t]his inner rapprochement between Biblical faith and Greek philosophical inquiry was an event of decisive importance" that marks "world history."

Here again we see the parallel with Habermas, who no longer sees in "modern science a practice that is completely understandable in its own terms, establishing the measure of all truths and falsehoods," but rather the result of "a history of reason that includes the world religions."¹¹ For Benedict XVI, respect for the *logos* and the resulting conviction that "not acting reasonably (*σὺν λόγῳ*) is contrary to God's nature," are not "merely a Greek idea," but is "always and intrinsically true." Therefore what we are faced with is not an occasional "initial inculturation which ought not to be binding on other cultures" and which would give us the "right to return." We must continue to nurture an ambitious process of rational unveiling of the truth.

The consequences of this are obvious, and call into question the secularists' attempt, made in the name of neutrality, to seize for themselves alone the ability to offer reasons in public debate. The result of transforming the historical ties between religious traditions and certain rational ideas into a reason to disqualify them has been that: "[t]he West has long been endangered by this aversion to the questions which underlie its rationality, and can only suffer great harm thereby."

¹¹ J. Habermas, "Religion in the Public Sphere", *European Journal of Philosophy*, 14, 1, 2006, 20.

Aware of the ethical impoverishment of our society and convinced that the mere economic rationality of the market is incapable of resolving the situation, Habermas' agnosticism would not prevent him from recognizing that religions are capable of offering reasons in public debate. Benedict, too, would affirm that "listening to the great experiences and insights of the religious traditions of humanity, and those of the Christian faith in particular, is a source of knowledge, and to ignore it would be an unacceptable restriction of our listening and responding."

At Regensburg he suggested that Muslim culture's lack of acceptance of a reasonably accessible natural law would inevitably slow its prospects of broaching a dialogue with modernity. Only a rationally shareable natural law can open up a "dialogue of cultures," inviting the potential interlocutors to have access "to this great *logos*, to this breadth of reason." Equally far from being capable of dialogue, according to Habermas,¹² are those secular people who forget that the liberal state "must not discourage religious persons and communities from also expressing themselves politically as such, for it cannot know whether secular society would not otherwise cut itself off from key resources for the creation of meaning and identity."¹³ Essentially, he is suggesting at once that "the world's profoundly religious cultures see this exclusion of the divine from the universality of reason as an attack on their most profound convictions. A reason which is deaf to the divine and which relegates religion into the realm of subcultures is incapable of entering into the dialogue of cultures."

The disinclination of many religious people toward reflection and rational argument may turn out to be just as bad as the lack faith of those who claim to have a monopoly on reason. Therefore, it is a real gift to be able to rely on the teachings of a Pope who truly exercised his role as *Defensor rationis*.

¹² I explored this topic in "Poder o racionalidad. La religión en el ámbito público (En diálogo con la "sociedad postsecular" de Jürgen Habermas)," *Anales de la Real Academia de Ciencias Morales y Políticas* 2012 (LXIV-89), 147-156.

¹³ J. Habermas, "Religion in the Public Sphere," 10.

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